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Pathmanabhan a/l Nalliannen v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–154–06 OF 2013, B-05–155–06 OF 2013, B-05–156–06 OF 2013 AND B-05–157–06 OF 2013
AZIAH ALI, TENGKU MAIMUN AND ZAKARIA SAM JJCA
4 DECEMBER 2015

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Criminal Procedure — Trial — Prosecution's case — Whether prosecution failed to make out prima facie case against appellants — Whether prosecution led any direct or circumstantial evidence that four alleged victims had been murdered — Whether prosecution reneged on its undertaking not to use record of proceedings D *containing guilty pleas of two important witnesses — Whether acts of prosecution constituted prosecutorial misconduct — Whether appellants had been deprived of fair trial procedurally and substantively*

E *Evidence — Documentary evidence — Admissibility of — Whether record of proceedings containing guilty pleas properly admitted in present criminal appeal — Whether evidence could be corroborative of the fact that victims were burnt to death — Admissibility of computer printouts — Whether properly admitted — Whether printouts were corroborative of fact that victims had gone to Banting* F *— Conflicting testimony — Oral evidence of police inspector contradicted by his police report — Whether trial judge correct in assessment of evidence — Whether there was appealable error in assessment — Information leading to fact discovered — Whether knowledge that second, third and fourth appellants had of places where incriminating items found pointed to their guilt — Credibility of witness* G *— Whether evidence of SP33 had been doctored to meet needs of police — Whether evidence of SP33 had been supported in material particulars by DNA evidence and other evidence — Circumstantial evidence — Nature of — Whether pointed to appellants as perpetrators of murder*

H On 30 August 2010, Sosilawati bt Lawiya ('Sosilawati'), a businesswoman, accompanied by her banker, Noorhisham bin Mohamad ('Hisham'), and her lawyer, Ahmad Kamil bin Abdul Karim ('Kamil'), travelled to Banting to meet her lawyer, the first appellant. The car that Sosilawati was travelling in was driven by her driver, Kamaruddin bin Shamsuddin ('Kamal'). On their way to I Banting, Sosilawati and her travelling companions had made various telephone calls to their family and friends alluding to their trip to Banting, but after about 8.30pm on 30 August 2010 neither Sosilawati nor her companions could be contacted. Following reports lodged by the family members of Sosilawati and her missing travelling companions, the police mounted an investigation which

led them to a farm in Banting, which belonged to the first appellant. Further investigations led to the arrest of the first appellant, the lawyer that Sosilawati and her companions had arranged to meet in Banting in relation to the two cheques issued by the first appellant; and the arrest of the second to fourth appellants, who worked for the first appellant on his farm. The four appellants were charged with the murder of Sosilawati and her three companions, an offence under s 302 of the Penal Code ('the Code') read together with s 34 of the same Code. It was the prosecution's case that the only person who had dealings with Sosilawati was the first appellant and that if there was any grudge, it should be borne by the first appellant and that the second to fourth appellants were his lackeys executing his instructions. The prosecution sought to establish its case through the testimony of Siti ('SP33'), the first appellant's Indonesian maid, who testified that she saw one woman and three men arriving at the farm at about 7pm on 30 August 2010. SP33 also testified that she had heard a woman scream and had seen a big fire on the farm later that evening. Apart from the oral testimonies of family members and friends as to the journey of Sosilawati and company to the Banting farm, the prosecution led evidence of telecommunication printouts ('TELCO') and call detail records ('CDRs') to establish that Sosilawati and company had come to the farm in two cars. The police inspector in charge of the investigation (SP32) testified that the information given by the second and fourth appellants and another led to the discovery of amongst others a cricket bat, blood stains on the wall of the premises at the farm, bone pieces, hand phones, wrist watches, car keys, burnt logs and zinc sheets. The chemist testified that the blood stains found on some of the items discovered matched that of Sosilawati's travelling companions. However, no positive findings could be made on the bones discovered, which were mostly human bones, as they had been subjected to extreme heat and had lost all traces of DNA. Two very important witnesses for the prosecution were SP29 and SP59, who were arrested together with the second to fourth appellants. SP29 was charged with disposing the ashes of Sosilawati and company, while SP59 was charged with helping to burn the bodies of Sosilawati and company. Although both SP29 and SP59 both pleaded guilty to the charges, they testified before the trial judge that they had been coerced into pleading guilty. However, the trial judge admitted the record of proceedings containing the guilty pleas of SP29 and SP59 (exhs P711 and P712) and found that these records were corroborative of the fact that Sosilawati and company were burnt to death. Based on the evidence adduced the trial judge made an inference that Sosilawati had been lured to the farm by the first appellant. From the testimony of SP33 as to the manner in which Sosilawati and company were burnt to death the trial judge found that there had been a pre-arranged plan orchestrated by the first appellant and carried out by the second to fourth appellants, which brought into action the provision of s 34 of the Penal Code on common intention. Consequently, the trial judge found that the prosecution had successfully proven all the ingredients of the charge of murder under s 302(a) of the Code and called the appellants to enter their defence. The

A B C D E F G H I

first appellant denied having met Sosilawati and company at the farm and claimed that at about 8.30pm on 30 August 2010, the fourth appellant had driven him to a hotel in Subang Jaya to meet a friend. The second to fourth appellants claimed that they together with SP29 and SP59 had gathered at the farm around midnight on 30 August 2010 to hoist the Malaysian flag and light a small fire to celebrate Merdeka. The second and third appellants also testified that the first appellant had not come to the farm on 30 August 2010. The fourth appellant, contradicted the evidence of the other three appellants and testified that Sosilawati and company had come to the farm on the night in question. According to the fourth appellant, the first appellant had instructed the second and third appellants to kill Sosilawati's companions and he had witnessed the victims being burnt on the farm. Having considered the evidence of the defence, the trial judge chose to disbelieve the evidence of the first three appellants that nothing transpired at the farm on the night in question. In the final analysis the trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death. This was the appellants' appeal against those convictions and sentences. In short, the appellants appealed on the grounds that, inter alia, the prosecution had failed to make out a prima facie case against the appellants and that the prosecution had led no evidence, direct or circumstantial, that the four alleged victims were dead or had been murdered. The appellants argued that the prosecution had reneged on its undertaking not to use the record of proceedings containing the guilty pleas of SP29 and SP59 (exhs P711 and P712) in the murder trial against the appellants and that this constituted prosecutorial misconduct. As such the appellants submitted that they had been deprived of a fair trial procedurally and substantively.

Held, dismissing the appeals:

(1) There were merits in the complaints raised by the appellants as to whether exhs P711 and P712 could be properly admitted under the law. It is settled law that the evidence of a prior conviction would not have been admissible in separate criminal proceedings to establish the truth of the underlying allegation as it was *res inter alios acta* (not the concern of others). In fact, the proper place to challenge the credibility of SP29 and SP59 vis a vis exhs P711 and P712 was to put the said exhs to SP29 and SP59, which the prosecution had failed to do. Further, the trial judge had ruled that exhs P711 and P712 were admissible under s 35 of the Evidence Act 1950 ('the Act'). However, s 35 of the Act governed the admissibility of non-judicial public documents, whereas exhs P711 and P712 were judicial records that fell under s 33 of the Act. Section 33 of the Act would have been applicable but for the fact that SP29 and SP59 were available and had testified in the trial. In the circumstances, exhs P711 and P712 were wrongly admitted into the trial and could neither

form the basis of the convictions nor could be of any corroborative value (see paras 80 & 83–89).

(2) The trial judge had committed an appealable error in his ruling that the police reports lodged by SP32 were inadmissible. In the light of the material contradiction between the evidence of SP32 and his police report, the finding of the trial judge that there was no material contradiction was perverse. Be that as it may, the appellants had not been deprived of their rights to a fair trial as the appellants had every opportunity to cross-examine SP32. The evidence of SP32 also led to the discovery of the incriminating items. However, in order for s 27 of the Act to apply the discovery of a fact should be the consequence of the information given by the accused person; the police should not have prior knowledge of the fact; and the discovery should be the finding of something which had been partially or wholly concealed and had been found out as a consequence of the information given by the accused. In the instant appeal, the police had no prior knowledge of the locations where the personal items that had the DNA of Sosilawati's companions, and where the cars belonging to the victims were to be found. These items could not have been found but if not for the information given by the second to the fourth appellants. The acts of the second, third and fourth appellants in taking SP32 and pointing to the places where the items were recovered amounted to conduct which was admissible under s 8 of the Act. As such, the evidence of SP32 was accepted insofar as it related to the fact that the second to fourth appellants had displayed conduct consistent with their knowledge of the places where the items connected to the victims were disposed of. The knowledge that the second, third and fourth appellants had of the places where the incriminating items were found and their conduct in leading the police to those places was a definite pointer towards their guilt (see paras 101–102, 105, 117–118, 122–123 & 185).

(3) The trial judge was correct in finding that the witnesses from Celcom, Digi and Maxis respectively had full management and control of the computers generating the documents and had confirmed the accuracy of the data produced in the TELCO information and CDRs. There were only minor discrepancies between the CDRs and the oral testimony. As such, there was no reason to disturb the findings of the trial judge in respect of the admission of these records. Viewed together with the oral evidence of the family members of Sosilawati and the three other victims the evidence from the CDRs was corroborative of the fact that Sosilawati and company had indeed gone to Banting (see paras 131, 134 & 136).

(4) As for the contention that there was cross-contamination of the exhibits, there was no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and

medical officers were vitiated. Notwithstanding the lack of positive findings of the bones recovered from the farm and the river and the lack of proof on accelerants, the evidence of SP33 and the presence of the DNA of three of the victims found on the cricket bat, blood stains on the wall and on the zinc sheets was sufficient to establish that all three of Sosilawati's companions had been burnt on the farm (see paras 146 & 153–154).

(5) It was clear that the trial judge had directed his mind to the challenge made by the appellants on the credibility of SP33. The principle in respect of credibility of witnesses was trite, namely that it was within the domain of a trial judge and that unless there were compelling reasons for appellate intervention, an appellate court would defer to the findings of the trial judge. In the present case the trial judge had given his reasons as why he chose to believe SP33, which was supported in material particulars by the CDRs, the DNA evidence and the evidence of the fourth appellant (see paras 159 & 161–162).

(6) It is settled law that common intention could be inferred from the facts and surrounding circumstances of the case. As there was no evidence of discussion between the appellants, the only evidence that could be relied on as regards the participation of all the appellants was from the evidence of SP33, who testified that the appellants were present on the farm at the material time, and from the conduct of the second to fourth appellants. It is a clear principle of law that for the participation requirement, even a passive role in the commission of the act was enough. It was in the evidence of the fourth appellant that the second and third appellants arranged the bodies of Sosilawati's companions on the logs and subsequently burnt them (see paras 165 & 167).

(7) The first appellant's defence of alibi was riddled with contradictions and failed to raise a reasonable doubt on the prosecution's case (see paras 178–179).

(8) At the conclusion of the trial the prosecution had proved its case against the appellants beyond reasonable doubt. The evidence of the fourth appellant had corroborated SP33 in material particulars and had strengthened the prosecution case. Although the DNA of Sosilawati was not found on any of the incriminating items found, the inferences to be drawn from the facts and circumstances of this case unerringly led to the conclusion that within all human probability, Sosilawati was dead and that the appellants were the perpetrators of the murder of Sosilawati and her three companions (see paras 187–188).

[Bahasa Malaysia summary

Pada 30 Ogos 2010, Sosilawati bt Lawiya ('Sosilawati'), seorang ahli perniagaan wanita, ditemani oleh pegawai banknya, Noorhisham bin

Mohamad ('Hisham'), dan peguamnya, Ahmad Kamil bin Abdul Karim ('Kamil'), dalam perjalanan ke Banting untuk berjumpa peguamnya, perayu pertama. Kereta yang membawa Sosilawati dipandu oleh pemandunya, Kamarusin bin Shamsuddin ('Kamal'). Dalam perjalanan mereka ke Banting, Sosilawati dan rakan-rakan seperjalanannya telah membuat beberapa panggilan telefon kepada ahli keluarga dan rakan-rakan mereka memberitahu tentang perjalanan mereka ke Banting, tetapi selepas lebih kurang 8.30 malam pada 30 Ogos 2010 Sosilawati mahupun rakan-rakannya tidak boleh dihubungi. Berikutan laporan yang dibuat oleh ahli keluarga Sosilawati dan rakan-rakan seperjalanannya yang hilang, pihak polis telah memulakan siasatan yang membawa mereka kepada satu ladang di Banting, dimiliki oleh perayu pertama. Siasatan lanjut telah membawa kepada tangkapan perayu pertama, peguam yang Sosilawati dan rakan-rakannya telah diatur untuk berjumpa di Banting berkaitan dua cek yang dikeluarkan oleh perayu pertama; dan tangkapan perayu-perayu kedua hingga keempat, yang bekerja untuk perayu pertama di ladangnya. Keempat-empat perayu telah dituduh membunuh Sosilawati dan tiga rakannya, satu kesalahan di bawah s 302 Kanun Keseksaan dibaca bersama s 34 Kanun yang sama. Ia adalah kes pendakwaan bahawa satu-satunya orang yang mempunyai urusan dengan Sosilawati adalah perayu pertama dan bahawa jika ada apa-apa dendam, ia patut ditanggung oleh perayu pertama dan bahawa perayu-perayu kedua hingga keempat adalah orang suruhannya yang melaksanakan arahannya. Pendakwaan memohon untuk membuktikan kesnya melalui testimoni Siti ('SP33'), orang gaji Indonesia perayu, yang memberi keterangan yang dia melihat seorang wanita dan tiga lelaki tiba di ladang itu lebih kurang pukul 7 petang pada 30 Ogos 2010. SP33 juga memberi keterangan bahawa dia telah mendengar jeritan seorang wanita dan melihat api besar di ladang itu lewat petang itu. Selain daripada testimoni lisan ahli keluarga dan rakan-rakan berhubugan perjalanan Sosilawati dan rakan-rakannya ke ladang Banting itu, pendakwaan mengemukakan keterangan tentang cetakan telekomunikasi ('TELCO') dan rekod panggilan terperinci ('RPT') untuk membuktikan bahawa Sosilawati dan rakan-rakannya telah datang ke ladang itu dalam dua kereta. Inspektor polis yang bertugas untuk siasatan itu ('SP32') memberi keterangan bahawa maklumat itu yang diberikan oleh perayu-perayu kedua dan keempat dan seorang yang lain telah membawa kepada penemuan antara lain kayu pemukul kriket, kesan darah pada dinding premis di ladang itu, kepingan tulang, telefon bimbit, jam tangan, kunci kereta, kayu bakar dan kepingan zink. Ahli kimia memberi keterangan bahawa kesan darah yang didapati pada beberapa barangan yang ditemui sepadan dengan rakan-rakan Sosilawati. Walau bagaimanapun, tiada penemuan positif dapat dibuat pada tulang-tulang yang ditemui, yang mana kebanyakannya adalah tulang manusia, kerana tulang-tulang itu terkena kepanasan yang melampau dan telah hilang semua kesan DNA. Dua saksi penting untuk pendakwaan adalah SP29 dan SP59, yang telah ditangkap bersama dengan perayu-perayu kedua hingga keempat perayu. SP29 telah dituduh membuang abu Sosilawati dan

rakan-rakannya, manakala SP59 telah dituduh membantu membakar mayat Sosilawati dan rakan-rakannya. Walaupun kedua-dua SP29 dan SP59 mengaku bersalah terhadap pertuduhan itu, mereka memberi keterangan di hadapan hakim perbicaraan bahawa mereka telah dipaksa untuk mengaku bersalah. Walau bagaimanapun, hakim perbicaraan telah menerima rekod prosiding yang mengandungi pengakuan bersalah SP29 dan SP59 (eksh P711 dan P712) dan mendapati bahawa rekod-rekod tersebut menyokong fakta yang Sosilawati dan rakan-rakannya telah dibakar sehingga mati. Berdasarkan keterangan yang dikemukakan hakim perbicaraan telah membuat inferens bahawa Sosilawati telah dipujuk untuk ke ladang itu oleh perayu pertama. Berdasarkan testimoni SP33 berhubung cara Sosilawati dan rakan-rakannya telah dibakar sehingga mati mahkamah perbicaraan mendapati bahawa terdapat rancangan yang telah dirancang terlebih dahulu yang diatur oleh perayu pertama dan dilaksanakan oleh perayu-perayu kedua hingga keempat, yang memulakan tindakan peruntukan s 34 Kanun Keseksaan berhubung niat bersama. Berikutan itu, hakim perbicaraan mendapati bahawa pendakwaan dengan jaya telah membuktikan semua elemen pertuduhan membunuh di bawah s 302(a) Kanun Keseksaan ('Kanun') dan memanggil perayu-perayu untuk memasukkan pembelaan mereka. Perayu pertama menafikan telah berjumpa Sosilawati dan rakan-rakannya di ladang itu dan mendakwa bahawa lebih kurang 8.30 malam pada 30 Ogos 2010, perayu keempat telah memandu dirinya ke hotel di Subang Jaya untuk berjumpa seorang kawan. Perayu-perayu kedua hingga keempat mendakwa bahawa mereka bersama dengan SP29 dan SP59 telah berkumpul di ladang itu lebih kurang tengah malam pada 30 Ogos 2010 untuk menaikkan bendera Malaysia dan memulakan api yang kecil di ladang itu sekitar tengah malam pada 30 Ogos 2010. Perayu keempat, menentang keterangan tiga perayu yang lain itu dan memberi keterangan bahawa Sosilawati dan rakan-rakannya telah datang ke ladang itu pada malam yang dipersoalkan. Menurut perayu keempat, perayu pertama telah mengarahkan perayu-perayu kedua dan ketiga untuk membunuh rakan-rakan Sosilawati dan dia telah menyaksikan mangsa dibakar di ladang itu. Setelah mengambil kira keterangan pembelaan, hakim perbicaraan memilih untuk tidak mempercayai keterangan tiga perayu pertama bahawa tiada apa-apa yang berlaku di ladang itu pada malam yang dipersoalkan. Dalam analisis akhir hakim perbicaraan mendapati bahawa keterangan mengikut keadaan yang dikemukakan oleh pendakwaan adalah mencukupi untuk membuktikan kesnya melampaui keraguan munasabah. Perayu-perayu dengan itu telah disabitkan dan dihukum mati. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman tersebut. Pendek kata, perayu-perayu telah merayu atas alasan bahawa, antara lain, pendakwaan telah gagal untuk membuktikan kes prima facie terhadap perayu-perayu dan bahawa pendakwaan tidak mengemukakan apa-apa keterangan, secara langsung atau mengikut keadaan, bahawa keempat-empat mangsa yang dikatakan itu telah mati atau dibunuh. Perayu-perayu telah berhujah bahawa pendakwaan telah memungkiri aku janjinya untuk tidak menggunakan rekod prosiding yang mengandungi

pengakuan bersalah SP29 dan SP59 (eksh P711 dan P712) dalam perbicaraan pembunuhan terhadap perayu-perayu dan bahawa ini merupakan salah laku pendakwaan. Oleh itu perayu-perayu berhujah bahawa mereka telah terkilan satu perbicaraan adil secara prosedur dan substantif.

Diputuskan, menolak rayuan-rayuan:

(1) Terdapat merit dalam aduan-aduan yang dibangkitkan oleh perayu-perayu tentang sama ada ekshs P711 dan P712 boleh diterima sewajarnya di bawah undang-undang. Ia adalah undang-undang tetap bahawa keterangan untuk sabitan terdahulu tidak boleh diterima dalam prosiding jenayah berasingan bagi membuktikan kebenaran dakwaan asas kerana ia adalah *re inter alios acta* (tidak menjadi masalah yang lain). Bahkan, tempat yang betul untuk mencabar kebolehpercayaan SP29 dan SP59 vis a vis ekshs P711 dan P712 adalah untuk mengemukakan ekshibit-ekshibit tersebut kepada SP29 dan SP59, yang mana pendakwaan telah gagal berbuat demikian. Selanjutnya, hakim perbicaraan telah memutuskan bahawa eksh P711 dan P712 boleh diterima di bawah s 35 Akta Keterangan 1950 ('Akta tersebut'). Walau bagaimanapun, s 35 Akta tersebut mengawal kebolehterimaan dokumen-dokumen awam yang bukan bersifat kehakiman, manakala ekshs P711 dan P712 merupakan rekod kehakiman yang jatuh di bawah s 33 Akta tersebut. Seksyen 33 Akta tersebut boleh terpakai tetapi oleh kerana fakta bahawa SP29 dan SP59 telah sedia ada dan memberi keterangan dalam perbicaraan. Dalam keadaan berikut, ekshs P711 dan P712 telah diterima secara salah untuk perbicaraan dan tidak boleh membentuk asas sabitan ataupun mempunyai nilai menyokong (lihat perenggan 80 & 83–89).

(2) Hakim perbicaraan telah melakukan kekhilafan yang boleh dirayu dalam keputusannya bahawa laporan polis yang dibuat oleh SP32 tidak boleh diterima. Berdasarkan percanggahan material antara keterangan SP32 dan laporan polisnya, penemuan hakim perbicaraan bahawa tiada percanggahan material adalah tidak munasabah. Jadi kerana itu, perayu-perayu tidak terkilan hak mereka untuk perbicaraan yang adil kerana perayu-perayu mempunyai peluang untuk memeriksa balas SP32. Keterangan SP32 juga membawa kepada penemuan barangan yang menunjukkan bersalah. Walau bagaimanapun, untuk s 27 Akta tersebut terpakai penemuan fakta hendaklah menjadi akibat maklumat diberikan oleh orang tertuduh; polis tidak patut mempunyai pengetahuan sedia ada tentang fakta itu; dan penemuan itu hendaklah merupakan penemuan sesuatu yang sebahagiannya atau keseluruhannya disembunyikan dan ditemui akibat daripada maklumat yang diberikan oleh tertuduh. Dalam rayuan ini, polis tiada pengetahuan sedia ada tentang lokasi di mana barangan peribadi yang mempunyai DNA rakan-rakan Sosilawati, dan di mana kereta milik mangsa-mangsa

ditemui. Barangan tersebut tidak mungkin dijumpai jika bukan kerana maklumat yang diberikan oleh perayu-perayu kedua hingga keempat. Tindakan perayu-perayu kedua, ketiga dan keempat yang membawa SP32 dan menunjukkan tempat-tempat di mana barangan yang ditemui itu merupakan kelakuan yang boleh diterima di bawah s 8 Akta tersebut. Oleh itu, keterangan SP32 diterima setakat mana ia berkenaan fakta bahawa perayu-perayu kedua hingga keempat menunjukkan kelakuan yang konsisten dengan pengetahuan mereka berhubung tempat-tempat di mana barangan yang berkait dengan mangsa-mangsa itu dibuang. Pengetahuan perayu-perayu kedua, ketiga dan keempat tentang tempat-tempat di mana barangan yang menunjukkan bersalah itu dijumpai dan kelakuan mereka yang membawa polis ke tempat-tempat tersebut adalah petunjuk yang pasti terhadap kesalahan mereka (lihat perenggan 101–102, 105, 117–118, 122–123 & 185).

(3) Hakim perbicaraan adalah betul dalam mendapati saksi-saksi daripada Celcom, Digi dan Maxis masing-masingnya mempunyai pengurusan dan kawalan komputer-komputer yang menjana dokumen-dokumen dan telah mengesahkan ketepatan data yang dihasilkan dalam maklumat TELCO dan RPT. Hanya terdapat percanggahan kecil antara RPT dan testimoni lisan itu. Oleh itu, tiada sebab untuk mengganggu penemuan hakim perbicaraan berkaitan penerimaan rekod-rekod tersebut. Dilihat bersama keterangan lisan ahli keluarga Sosilawati dan tiga mangsa lain RPT itu menyokong fakta bahawa Sosilawati dan rakan-rakannya memang telah pergi ke Banting (lihat perenggan 131, 134 & 136).

(4) Berhubung hujah bahawa terdapat pencemaran silang ekshibit-ekshibit itu, tiada keterangan bahawa integrity ekshibit-ekshibit itu telah sebenarnya dikompromi bahawa hasil analisis oleh ahli kimia dan pegawai perubatan terjejas. Walaupun penemuan positif tulang-tulang yang ditemui dari ladang itu dan sungai itu tidak mencukupi dan kurang bukti bahan penyebaran api, keterangan SP33 dan kewujudan DNA tiga mangsa yang ditemui pada kayu pemukul kriket, kesan darah pada dinding dan pada kepingan zink adalah mencukupi untuk membuktikan bahawa ketiga-tiga rakan Sosilawati telah dibakar di ladang itu (lihat perenggan 146 & 153–154).

(5) Ia adalah jelas bahawa hakim perbicaraan telah salah arah mindanya terhadap cabaran yang dibuat oleh perayu-perayu tentang kebolehpercayaan SP33. Prinsip berkaitan kebolehpercayaan saksi adalah dipertikaikan, terutamanya jika dalam domain hakim perbicaraan dan jika terdapat alasan yang menarik untuk campur tangan pihak rayuan, mahkamah rayuan boleh menangguhkan penemuan hakim perbicaraan itu. Dalam kes ini hakim perbicaraan telah memberikan alasannya tentang kenapa beliau memilih untuk mempercayai SP33, yang disokong dalam butiran penting oleh RPT, keteragan DNA dan

keterangan perayu keempat (lihat perenggan 159 & 161–162).

(6) Adalah undang-undang tetap bahawa niat bersama boleh disimpulkan daripada fakta dan keadaan sekeliling kes itu. Oleh kerana tiada keterangan tentang perbincangan antara perayu-perayu, satu-satunya keterangan yang boleh digunakan berkenaan penglibatan semua perayu-perayu adalah daripada keterangan SP33, yang telah memberi keterangan bahawa perayu-perayu berada di ladang itu pada masa matan, dan daripada kelakuan perayu-perayu kedua hingga keempat. Ia adalah prinsip undang-undang yang jelas bahawa untuk keperluan penglibatan, walaupun peranan pasif dalam pelakuan perbuatan itu adalah mencukupi. Ia terdalam dalam keterangan perayu keempat bahawa perayu kedua dan ketiga telah mengatur mayat rakan-rakan Sosilawati atas kayu-kayu itu dan kemudiannya membakar mereka (lihat perenggan 165 & 167).

(7) Pembelaan alibi perayu pertama itu penuh dengan percanggahan dan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 178–179).

(8) Pada akhir perbicaraan itu pendakwaan telah membuktikan kes terhadap perayu melampaui keraguan munasabah. Keterangan perayu keempat telah menyokong SP33 dalam butir-butir material dan telah mengukuhkan kes pendakwaan. Walaupun DNA Sosilawati tidak dijumpai di mana-mana barangan yang menuduh yang ditemui, kesimpulan yang boleh dibuat berdasarkan fakta dan keadaan kes ini tanpa silap membawa kepada kesimpulan bahawa dalam semua kebarangkalian manusia, Sosilawati telah mati dan bahawa perayu-perayu adalah pelaku pembunuhan Sosilawati dan tiga rakannya (lihat perenggan 187–188).]

Notes

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1456–1482.

For cases on prosecution's case, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 5927–5948.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336, SC (refd)

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367, FC (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)

Bala Anak Matik v PP [2006] 3 MLJ 516, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Francis Anthonysamy v PP [2005] 2 CLJ 481, FC

Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65, HC (refd)
Harun bin Abdullah v PP [2009] 3 MLJ 337; [2009] 4 CLJ 717, CA (refd)
Hollington v F Hewthorn and Company, Limited and another [1943] KB 587, CA (folld)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Raggs v Magistrate's Court of Victoria and Corcoris [2008] VSC 1, SC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643, FC (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121, FC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 4 AMR 709, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lim Pah Soon v PP [2013] 6 MLJ 252; [2013] 8 CLJ 800, CA (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Mustapha bin Awang Besar lwn Pendakwa Raya [2015] 3 MLJ 347, CA (refd)
Ong Chee Hoe & Anor v PP [1999] 4 SLR 688, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (refd)
PP v Leong Heo Cheong [1990] 2 CLJ 818, HC (refd)
PP v Liew Sam Seong [1982] 1 MLJ 223 (refd)
PP v Lim Teik Seng & Ors [1985] CLJ Rep 691, HC (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702, HC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)
Prakash Chand v State (Delhi Administration) 1979 AIR 400, SC (refd)
Ramkishan Mithanlal Sharma v The State of Bombay 1955 AIR 104, SC (refd)
Sharad Birdhi Chand Sarda v State of Maharashtra [1984] 4 SCC 116, SC (folld)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
State of MP v Dhannalal Moruji 1961 CriLJ 238, HC (refd)
Syamo Malia Patro v Emperor AIR 1932 Mad 391 (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166, SC (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356, SC (refd)
Wan Marzuki bin Wan Abdullah v PP [2008] MLJU 285; [2008] 4 CLJ 631, CA (refd)
Wan Marzuki bin Wan Abdullah v PP [2010] MLJU 2092; [2013] 1 CLJ 177, FC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 179(1), 402A
Evidence Act 1950 ss 3, 8, 11, 11(b), 17, 24, 27, 34, 35, 40, 44, 73, 74, 90A, 103, 145
Penal Code ss 34, 302, 302(a)

Appeal from: Criminal Trial Nos 45B-52, 54, 55 and 56 of 2011 (High Court, Shah Alam).

Manjeet Singh Dhillon (Manjeet Singh Dhillon) in Criminal Appeal No B-05–154–06 of 2013 for the appellant.
Gurbachan Singh (Hisham Teh Poh Teik with him) (Bachan & Kartar) in Criminal Appeal No B-05–155–06 of 2013 for the appellant.
Amer Hamzah bin Arshad (Khaizan Sharizad bt Ab Razak with him) (Amer Hamzah & Sharizad) in Criminal Appeal No B-05–156–06 of 2013 for the appellant.
Stanislaus Vethanayagam (MS Vethanayagam & Assoc) in Criminal Appeal No B-05–157–06 of 2013 for the appellant.
Ishak Mohd Yusoff (Saiful Edris Zainuddin, Idham Abd Ghani, Norinna Bahadun and Jasmee Hameeza Jaafar with him) (Deputy Public Prosecutor, Attorney General's Chamber) in Criminal Appeal Nos B-05–154–06 of 2013, B-05–155–06 of 2013, B-05–156–06 of 2013 and B-05–157–06 of 2013 for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The first to the fourth appellants (the first to the fourth accused in the court below) were convicted and sentenced to death by the High Court at Shah Alam on four counts of murder, an offence under s 302 of the Penal Code read together with s 34 of the same Code. The first to the fourth charges relate to the murder of Kamaruddin bin Shamsuddin; Noorhisham bin Mohamad; Sosilawati bt Lawiya and Ahmad Kamil bin Abdul Karim, respectively. The appellants were said to have committed the offence on 30 August 2010 at Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, Selangor.

[2] The murder trial began with the journey of Sosilawati, Kamaruddin, Noorhisham and Ahmad Kamil (Sosilawati and company) to Banting on 30 August 2010. They never came home and their bodies were never found.

PROCEEDINGS IN THE HIGH COURT

[3] Briefly, the prosecution case was that on 30 August 2010 Sosilawati had told her daughter, Erni Dekriwati Yuliana bt Buhari (SP15), that she was going to Banting to meet lawyer Pathma (the first appellant). The purpose of the visit as told by Sosilawati to SP15 was to bring forward the payments on two cheques in the amount of RM3m and RM1m respectively issued by the first appellant. Sosilawati needed money to pay bonuses to her staff and to give her family for the upcoming Hari Raya festival.

[4] Sosilawati left her office at Nouvelles Visages, No 59, Lorong Haji Hussein 1, Off Jalan Raja Bot, Kuala Lumpur with her driver, Kamaruddin ('Kamal') in her BMW car bearing registration number WTL 11.

[5] Sosilawati was accompanied by a banker, Noorhisham ('Hisham') and a lawyer, Ahmad Kamil ('Kamil'). Hisham and Kamil were travelling in another car, a BMW bearing registration number AAJ 5, which belonged to Kamil. Hisham's wife (Suzanna bt Radin Pangat, SP8) and Kamil's wife (Sabrina bt Adnan, SP14) had testified to the fact that their husbands were accompanying Sosilawati to Banting.

[6] Throughout the journey to Banting, there were various telephone conversations between Sosilawati and company with their family and friends, alluding to the fact that they were going to Banting.

[7] Kamal's nephew, Khairul Izwan bin Ismail (SP9) spoke to Kamal at about 5pm on 30 August 2010 about his intention to sleep over at the latter's house. Kamal had told SP9 that he was in Banting with Sosilawati.

[8] Lyly Zanariah bt Abdul Manaf (SP62), a bank officer at CIMB Kampung Baru Branch said that Hisham had informed her in the morning of 30 August 2010 that he would be in Banting in the evening of 30 August 2010 to break fast with a lawyer.

[9] At about 5.20pm, Zurayina bt Jemaat (SP7), a salesgirl at Fazz Enterprise Banting, saw Sosilawati and a person called 'Kamal' at her shop. Sosilawati had bought kerepek and cakes worth RM200.

[10] At about 7pm on 30 August 2010, Kamil called SP15. In the telephone conversation between Kamil and SP15, Kamil had said 'entah mak engkau bawa pergi hutan mana ni pokok kelapa sawit ni'. Kamil had also informed SP15 that Sosilawati was in another car in front of them.

[11] At about 8.30pm, SP15 received an unusual call from Sosilawati. Sosilawati had informed SP15 that Kamal had taken photographs of her in compromising positions via hidden cameras placed in her bathroom in her house. Sosilawati's friend, Habishah bt Bahari (SP16) received a similar call about Kamal. That was the final call that SP15 and SP16 received from Sosilawati. Upon checking Sosilawati's bathroom, SP15 found nothing incriminating.

[12] Hisham and Kamil had similarly made final calls to their wives informing them that they would not be returning home for the next three days

and that they would be going to Genting Highlands. The reason was related to the problem faced by Sosilawati and her driver. After the final calls, Sosilawati and company could no longer be contacted.

[13] On 31 August 2010 Sosilawati's ex-husband, Buhari bin Mohamed (SP24) and her daughter went to Banting to locate Sosilawati but they failed. SP24 had called the first appellant who denied having met Sosilawati on 30 August 2010.

[14] Following reports lodged by the respective family members, the police mounted an investigation and zeroed in on Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, a farm belonging to the first appellant (the farm).

[15] Siti Hamidah Karnax (SP33), an Indonesian maid of the first appellant working on the farm testified that at about 7pm on 30 August 2010, she saw one woman and three men at the farm and that she later heard a woman screamed and she also saw a big fire, the height of the adjoining palm oil trees. SP33 further testified that she had seen logs being off loaded from a lorry a day earlier by the third appellant and other workers and she had also observed the first and the fourth appellants making preparations indicating the arrival of guests.

[16] Apart from witnesses who testified orally as to the journey of Sosilawati and company to Banting and that they were seen on the farm, the prosecution led evidence of telecommunication (TELCO) printouts and the call detail records (CDRs) through witnesses from Celcom, Digi and Maxis.

[17] Inspector Govindan a/l Narayasamy (SP32) testified that the information given by the second to the fourth appellants and one Suresh a/l Ulaganathan (SP29) led to the discovery of among others, a cricket bat, blood stains on the wall of the premise at the farm, bone pieces, hand phones, wrist watches, car keys, burnt woods/logs and zinc sheets.

[18] The chemist, Lim Kong Boon (SP86) stated that the cricket bat had the DNA of Hisham, the blood stains (Swab 9) found on the wall of the premise at the farm matched that of the immediate family members of Hisham and the zinc sheets had the DNA of Kamal and Kamil. SP86 and Dr Zaleha bt Abdul Manaf (SP71) could not make any positive findings on the bones as they had been subjected to extreme heat and had lost all traces of DNA. But Dr Nurliza bt Abdullah (SP63), Dr Norhayati bt Jaafar (SP69), and SP71 stated that the bones recovered were most probably human bones.

[19] The prosecution attempted to adduce similar facts evidence through Samson Nahar bt Mohamed Dali (SP96) and Usha Rani Sethuraman (SP101)

where both SP96 and SP101 had stated that their husbands (Shafiq and Muthuraja respectively) had business and legal dealings with the first appellant and that both are missing to date.

[20] Two very important witnesses for the prosecution were SP29 and Sarawanan a/l Kandasamy (SP59) who were arrested together with the second and the fourth appellants. SP29 and SP59 were charged in the magistrates court at Teluk Datuk for disposing evidence related to this murder trial. SP29 was charged with disposing the ashes of Sosilawati and company whereas SP59 was charged with helping to burn the bodies of Sosilawati and company.

[21] Both SP29 and SP59 had pleaded guilty to the charge and had admitted to the facts tendered by the prosecution which contained statements that Sosilawati and company had been burnt to death at the farm and their ashes had been disposed off.

[22] Nevertheless, before the learned trial judge, SP29 and SP59 stated that nothing untoward happened at the farm on 30 August 2010. They alleged that they were coerced into pleading guilty and admitting to the facts of the case in the magistrates court.

[23] Based on the statements recorded by the police under s 112 of the Criminal Procedure Code ('the CPC'), the prosecution sought to impeach the credibility of SP29 and SP59. Two separate trials-within trial were conducted by the learned trial judge resulting in His Lordship's ruling that SP29's credibility was impeached and SP59 was a hostile witness, rendering the evidence of both SP29 and SP59 worthless.

[24] The prosecution, amid strong objections from the defence, then applied to adduce the records of proceedings in the magistrates court under ss 11 and 73 of the Evidence Act 1950 ('the EA'). After hearing arguments, the learned trial judge invoked ss 11 and 35 of the EA and allowed the application of the prosecution. The record of proceedings containing the guilty plea of SP29 and SP59 were marked exhibits P711 and P712 respectively.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[25] On the evidence of the family members, whose evidence the learned trial judge found to be credible, His Lordship made a finding of fact that Sosilawati did intend to go to Banting on 30 August 2010 to meet the first appellant in relation to the two cheques issued by the first appellant. From the evidence of SP7 and from the telephone conversations, the learned trial judge found that Sosilawati and company did embark and did in fact reach Banting.

In the face of the specific intention of Sosilawati to meet the first appellant in relation to the cheques, the learned trial judge found the unusual calls with regard to Kamal and not returning home for three days were just a ploy to throw the family off guard and to stop them from immediately searching for Sosilawati and company.

[26] As for the TELCO records, the learned trial judge found that they had accurately charted out the journey of Sosilawati and company and that the last calls made by Sosilawati and company were in the area where the farm is situated and since the farm belongs to the first appellant, it ties to the purpose of Sosilawati's trip to Banting which was to meet the first appellant.

[27] The learned trial judge found SP33 to be a credible and truthful witness and accepted her direct evidence that she had seen three men and one woman on the farm in the evening of 30 August 2010 and that there was a big fire on the farm later that evening.

[28] His Lordship accepted the evidence of SP32 that information had been obtained from the second to the fourth appellants and SP29 which led to the discoveries of hand phones, watches, bones, zinc sheets, cricket bat, blood stains, burnt logs and the two vehicles used by Sosilawati and company to travel to Banting.

[29] In determining whether the information under s 27 of the EA can be excluded and whether the second and the fourth appellants had suffered oppression to such an extent forcing them to give the information which they might not have otherwise given, the learned trial judge conducted a trial-within-trial. His Lordship concluded that the second and the fourth appellants suffered no such oppression.

[30] It was the finding of the learned trial judge that Sosilawati would not have gone to the farm unannounced. His Lordship made an inference that it was the first appellant who had lured Sosilawati to the farm. From the evidence of SP33, the learned trial judge found that the manner in which Sosilawati and company were burnt to death leans towards a pre-arranged plan orchestrated by the first appellant and carried out by the second to the fourth appellants which bring into action the provision of s 34 of the Penal Code on common intention.

[31] The probative value of exhs P711 and 712 was considered by the learned trial judge who accepted the exhibits as corroborative fact that Sosilawati and company had been burnt to death.

[32] The evidence in respect of Shafiq and Muthuraja was rejected by the

learned trial judge as being nothing more than a coincidence which did not qualify them to be considered as similar facts evidence.

[33] Having regard to the direct evidence of the witnesses, the telecommunication records and the inferences made from the conduct of the appellants in the discovery of the exhibits as well as the forensic and medical evidence, the learned trial judge found that the prosecution had successfully proven all the ingredients of the charge of murder under s 302(a) of the Penal Code, to a standard if unexplained by the appellants, can lead to their convictions. The appellants were thus called upon to enter their defence.

THE DEFENCE

[34] All the four appellants gave evidence under oath and a total of 26 other witnesses testified for the defence.

[35] The first appellant confirmed that he was the lawyer for Sosilawati and for one Rahman Palil in a land transaction in Penang but denied having met Sosilawati and company at the farm on 30 August 2010. He stated that at about 8.30pm on 30 August 2010, the fourth appellant had driven him to Subang Jaya to meet a friend.

[36] The second and the third appellants stated that they worked at the farm and admitted that they were present at the farm on 30 August 2010. They had stated that although the first appellant was the owner of the farm, their dealings were mostly with the fourth appellant who paid their salary and who directed and supervised their work on the farm. The second and the third appellants further testified that the first appellant did not come to the farm on 30 August 2010 and that nothing untoward happened at the farm on 30 August 2010. According to the second and the third appellants, both of them together with the fourth appellant, SP29 and SP59 had gathered at the farm around midnight on 30 August 2010 to hoist the Malaysian flag and to light a small fire to celebrate Merdeka. Thereafter, they ate and slept until the next morning.

[37] In the morning of 31 August 2010, the second appellant stated that he went to his grandmother's house and returned only in the evening. His grandmother, Angamma a/p Rengamy (SD13) confirmed the visit.

[38] The third appellant stated that on 31 August 2010 he carried out his routine duties at the farm.

[39] The fourth appellant testified that he stayed at the farm and that his role was limited to the construction works at the farm and to supervise the workers involved in the construction works. He stated that the rest of the farmhands

including the second and the third appellants were under the direct supervision of the first appellant and that the second appellant was also the bodyguard of the first appellant.

[40] Contrary to the evidence of the first, second and the third appellants, the fourth appellant stated that the first appellant was at the farm on 30 August 2010 and that Sosilawati and company came to the farm on 30 August 2010 to meet the first appellant. According to the fourth appellant, there were about four or five other people besides Sosilawati and company who came to the farm at the same time.

[41] The fourth appellant further stated that he heard a quarrel in one of the premises at the farm and when he went in, he saw Sosilawati's driver being beaten. He also testified to seeing the lawyer (Kamil) being beaten and that he heard the first appellant giving instructions to the second and the third appellants to kill the driver and the lawyer. The fourth appellant had also stated that he saw Sosilawati and company and few others being bundled to the neighbouring farm and the next morning he saw the persons being brought back to the farm. At the farm he witnessed the three persons accompanying Sosilawati being burnt on the arrangement of the logs at the location which he had marked on the sketch plan.

[42] It was further the evidence of the fourth appellant that the first appellant had cajoled him to accept what had happened and asked him and the second and the third appellants to remain silent on the matter. The first appellant had also prepared them to face a possible arrest and indicated that they could co-operate with the police as later they could retract any statement to the police by claiming that the statement was given under force.

[43] One aspect of the fourth appellant's testimony was at variance with the prosecution's case, namely the fourth appellant stated that he had seen Sosilawati on 7 September 2010 at Tanjung Sepat.

[44] The father of SP59, Kandasamy a/l Nadeson (SD15) testified that on the arrest of SP59, he had engaged the services of Avtaar Singh a/l Sukhdev Singh (SD9) to defend SP59 in the event SP59 was charged.

[45] SD15 stated that he was however summoned to the Kuala Lumpur police contingent head quarters where he was persuaded to appoint a lawyer whom the police recommended if he wanted to see his son being freed. He was pressurised into signing the warrant to act authorising the recommended lawyer to act for SP59.

[46] SD15 further stated that he was later informed that a team of lawyers

had been assigned to defend his son at the proceedings in the Magistrates Court Teluk Datuk. At this point, SD15 said that he had a change of heart and wanted to revert to SD9 but SP59 refused to revert to SD9.

[47] The evidence of SD9 echoed that of SD15 where SD9 testified as to how he was unceremoniously dumped in favour of another team of lawyers and that he only discovered this when he attended the Magistrates Court Teluk Datuk in the morning of the proceedings.

[48] ACP Abdul Aziz bin Zakaria (SD28) admitted that he had recommended his acquaintance, Roslie bin Sulle (SD30) to defend SP29 and SP59 when SD30 came to his office on an unrelated matter.

[49] SD30 confirmed that he acted for SP29 and SP59 with another lawyer by the name of Puravalen and that he did so with the explicit and written agreement of both the accused and their families.

[50] A number of police personnel were called by the defence to show that the oral testimony of SP32 and his team in relation to the information leading to discovery was contrary to the entries in the lock up register and that the movements in and out of the lock up showed that the appellants were kept away for a long period of time.

[51] Pavithra a/p Rama Sundran (SD26), an occupant on the farm confirmed that SP33 was also an occupant, working as a maid. According to SD26, nothing unusual happened at the farm on the night of 30 August 2010. She said she did not hear anything nor did she see any fire outside the house where they stayed. According to SD26 there was no unusual activity on 31 August 2010 as well.

[52] Sivabalan a/l Nagayah (SD20) was a government chemist entrusted with analysing soil samples from the tyres of the vehicles handed to him by the police. He confirmed that he was not requested or directed to carry out comparison studies of the soil samples taken from the tyres of the car with the soil samples taken from the farm.

[53] Balasubramaniam a/l P Chinaswary (SD12), a person who carried out the Hindu cremation ritual testified as to how a cremation took place and the aftermath of the cremation. It was the evidence of SD12 that the logs recovered by the police was not suitable for open burning and that it would be impossible for more than one body stacked on top of another to be burnt effectively.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[54] Having evaluated the evidence adduced by the defence as well as the evidence of the case as a whole, the learned trial judge found that there was a 'dog fight' as between the first three appellants and the fourth appellant.

[55] In particular, the learned trial judge adverted to the following instances. The first being the evidence of the first appellant that at about 8.30pm on 30 August 2010 he was driven by the fourth appellant to Subang Jaya which was denied by the fourth appellant. The second instance was the evidence of the first three appellants that the first appellant was not at the farm on the night of 30 August 2010 and that he did not meet Sosilawati and company at the farm that night or any time thereafter, while the fourth appellant contradicted the evidence of the first three appellants by testifying that Sosilawati and company came to the farm on 30 August 2010 and did meet the first appellant and that both the second and the third appellants were also present. Finally, the evidence of the first three appellants that nothing untoward happened at the farm on 30 August 2010 was again contradicted by the fourth appellant who testified that on the night of 30 August 2010, Sosilawati's driver was beaten up and that the fourth appellant saw the three persons who came together with Sosilawati being laid on the logs and being burned.

[56] The learned trial judge noted the explanation of the defence on the diversity of the evidence namely that there was a fall out between the first appellant and the fourth appellant when the first appellant had rejected a request for help from the fourth appellant.

[57] His Lordship found that the testimony of the fourth appellant was crafted to portray his innocence where he had distanced himself from all the criminal activities which he said happened at the farm on the 30 August 2010 and 31 August 2010. Nevertheless, having considered that a portion of the evidence of the fourth appellant was consistent with the evidence of the prosecution, the learned trial judge chose to disbelieve the evidence of the first three appellants that nothing transpired at the farm on 30 August 2010 in relation to Sosilawati and company and accepted that part of the evidence of the fourth appellant which supported the prosecution case. The learned trial judge made an affirmative finding of fact that Sosilawati and company were at the farm on 30 August 2010 and that all the four appellants did meet Sosilawati and company at the farm that night.

[58] In re-evaluating the evidence of the family members, the learned trial judge found that the first appellant gave no explanation that the family

members were mistaken or telling lies when testifying that Sosilawati and company were going to Banting to meet him.

[59] Considering that the defence led no evidence or produce their own records to counter the data contained in the TELCO records, the learned trial judge ruled that the evidence of the family members on the various calls made to Sosilawati and company stands.

[60] In respect of the evidence of SP33, the learned trial judge found that her evidence had not been dislodged by the evidence of SD26. A finding was made by the learned trial judge that SD26 was an 'undependable witness' and that she was evasive and had purposely refused to divulge any information incriminating the appellants. The learned trial judge chose to believe SP33 over SD26 as to what SP33 saw and heard on the night of 30 August 2010.

[61] As for the evidence of information leading to discovery, the learned trial judge found that the defence led no new evidence to enable him to reconsider his earlier ruling on s 27 of the EA. The learned trial judge was satisfied that all allegations raised by the defence were sufficiently covered and answered during the trial-within-trial.

[62] The learned trial judge evaluated that part of the evidence of the fourth appellant which was not consistent with the prosecution's case, namely when the fourth appellant said that on the night of 30 August 2010 more than four people apart from Sosilawati and company were present at the farm.

[63] The learned trial judge found it unbelievable that a total of nine to eleven people were present especially in the light of the subsequent evidence of the fourth appellant that these people together with Sosilawati and company were overpowered and confined to the neighbouring farm. His Lordship failed to see how the three farm hands could have overpowered such a large number of people.

[64] Given that the defence called no expert evidence of their own to counter the expert evidence of the doctors and chemist led by the prosecution, the learned trial judge found no reason to disregard the evidence of the prosecution relating to the finding of the human bones on the farm or the matching blood samples found on the zinc, cricket bat and on the wall.

[65] As for SD12, the learned trial judge did not accept his evidence that the logs recovered by the police on the information given by the second and fourth appellants were not suitable for open air burning. The learned trial judge stated that it would be an insult to the intelligence to rule that based on the evidence of SD12 no open air burning could have been carried out on the farm on

30 August 2010 as the finding of burnt logs, the charred remains of soil, the presence of fragmented burnt human bones and the burnt zinc pieces with blood spots could only mean that there was burning of bodies on the farm.

[66] The learned trial judge also found the evidence of SD12 that it would be impossible to burn one body on top of another to be his personal view, having noted that there is no evidence that SD12 had experimented with burning of a body on top of another. The learned trial judge found that such burning did take place as testified by the fourth appellant that he saw three bodies lying one on top of the other after which they were burnt.

[67] The learned trial judge had also made a finding on the motive of the first appellant to kill Sosilawati. This is how the learned trial judge puts it:

> In his evidence in court the first accused unwittingly spilled out a more cogent reason to commit murder. The first accused testified that for the same piece of land in Penang he was acting for both Sosilawati and Rahman Palil on 2 separate deals, both of which he had an interest in. He would stand to benefit more in the deal with Rahman Palil as the value of the land had sky rocketed.
>
> That was not the problem as the more serious problem was that Sosilawati might have had got wind of this double dealing and maybe even as to increase value of the land. According to the first accused he was reluctant to organize a meeting between Sosilawati and Rahman Palil.
>
> To me the reason for this was apparent as the first accused was caught between the devil and deep blue sea. On one hand was Sosilawati a well known entrepreneur and on the other hand in the words of the first accused a powerful politician. One of them had to be eliminated for the well being of the first accused and the person unfortunately was Sosilawati. The persons accompanying Sosilawati was merely at the wrong place at the wrong time.

[68] The submission of the defence that the prosecution had failed to stick to the facts mentioned in the opening statement when leading evidence in this case was considered by the learned trial judge. His Lordship found that the departure from the opening statement had not adversely affected the prosecution case and had not prejudiced the defence.

[69] In the final analysis, the learned trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death.

[70] Aggrieved by the convictions and sentences, the appellants appealed to this court.

A THE APPEAL

[71] Learned counsel for the respective appellant had put up an extensive written and oral submission. To avoid repetition, they had each submitted on specific issues and in so doing had adopted the submission of the other. We noted that essentially the complaint in this appeal was directed at the findings of the learned trial judge at the end of the prosecution case where it was submitted that the prosecution had failed to make out a prima facie case against the appellants; that the prosecution led no evidence, direct or circumstantial, that the four alleged victims named in the charges are dead or have been murdered, and if so, how, when, where, why and by whom.

[72] We do not wish to reproduce the submission of learned counsel for each of the appellant, except to state the gist of the submission as a whole on the following issues:

(a) exhs P711 and 712;

(b) s 27 information leading to discovery;

(c) the TELCO records/the CDRs;

(d) the DNA and forensic evidence;

(e) the credibility of SP33;

(f) common intention;

(g) other ancillary issues; and

(h) evaluation of the defence.

[73] Before we consider the issues raised, we keep in mind the following golden principles of the standard of proof required for recording a conviction on the basis of circumstantial evidence as laid down in *Sharad Birdhi Chand Sarda v State of Maharashtra* [1984] 4 SCC 116:

(a) the circumstances from which the conclusion of guilt is to be drawn must be fully established;

(b) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explainable on any other hypothesis except that the accused is guilty;

(c) the circumstances should be of a conclusive nature and tendency;

(d) they should exclude every possible hypothesis except the one to be proved; and

(e) there must be a chain of evidence so complete as not to leave a reasonable ground for the conclusion consistent with the innocence of the accused and must show in all human probability the act must be done by the accused.

EXHIBITS P711 AND 712

[74] As mentioned above, both SP29 and SP59 had turned hostile. The prosecution took the position that they should not be deprived of the valuable pieces of evidence, in particular the statement of facts admitted to in the magistrates court relating to what had happened to Sosilawati and company at the farm on 30 August 2010. Notwithstanding that the prosecution had, vide an affidavit, given an undertaking that the proceedings against SP29 and SP59 would not be used against the appellants in the murder trial, the prosecution applied to tender the records of proceedings in the Magistrates Court Teluk Datuk against SP29 and SP59 under ss 11 and 34 of the EA. The records from the magistrates court, exhs P711 and 712 were tendered through the Deputy Registrar, Norhayati bt Mohamad Yunus (SP105).

[75] The learned trial judge stated that the undertaking, even if given by the prosecution to the defence, does not bind the court. Although His Lordship found that exhs P711 and 712 are not relevant to the murder trial, he allowed the application of the prosecution under ss 11 and 35 of the EA as a basis to determine the credibility of SP29 and SP59. And further, although the learned trial judge found that the conviction of the appellants could not be premised on the exhibits, he found that P711 and 712 are corroborative of the fact that Sosilawati and company were burnt to death.

[76] It was the submission for the appellants that exhs P711 and P712 do not fall within s 35 and equally they do not fall within ss 40–44 of the EA and were thus wrongly admitted into the trial and thereafter wrongly used either as substantive or corroborative evidence.

[77] The appellants had also raised the issue that having given an undertaking that the records of proceedings against SP29 and SP59 in the magistrates court will not be used in the murder trial against the appellants, the learned DPPs had committed prosecutorial misconduct. And by the prosecution reneging on the undertaking, the appellants had been deprived of a fair trial procedurally and substantively. Learned DPP had submitted that the prosecution cannot be obstinately held to the undertaking if such undertaking would terminate its own case.

[78] It was further the submission for the appellants that the proper place to have raised or challenged the credibility of SP29 and SP59 vis a vis exhibits

P711 and 712 would have been to have put the exhs to SP29 and SP59 during the trial-within-trial, which was not done by the prosecution. On the authority of *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121, it was contended that material used in a trial-within-trial cannot form part of the main trial and cannot become substantive evidence against the appellants.

[79] In a nutshell, it was the contention of the appellants that the prosecution was attempting to bolster an otherwise collapsed case with the introduction of the inadmissible evidence of SP29 and SP59.

OUR FINDINGS ON EXHS P711 AND 712

[80] We find merits in the complaints raised by the appellants. We are of the view that the question is not so much about the undertaking but the more pertinent question is whether the said exhibits could be properly admitted under the law although we must state that in our view it was unethical for the prosecution to renege on its undertaking.

[81] As against the wishes of the prosecution to preserve its case, there lies the duty of the court to ensure that the prosecutor acts with the objective of proving its case in accordance with procedures and standards prescribed by the law (see *Raggs v Magistrate's Court of Victoria and Corcoris* [2008] VSC 1). To accept the assertion that the learned DPP may abandon what was promised earlier on behalf of the public prosecutor would render the public prosecutor unaffected by any sense of conventional wisdom and conscience (see *Harun bin Abdullah v Public Prosecutor* [2009] 3 MLJ 337; [2009] 4 CLJ 717) .

[82] Exhibits P711 and 712 are previous inconsistent statements of SP29 and SP59 and the law in this respect has been stated by the Federal Court in *Krishnan*, at p 124 as follows:

> It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words, the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[83] We adopt the rule set out in *Hollington v F Hewthorn and Company, Limited and another* [1943] KB 587 that the evidence of a prior conviction would not have been admissible in separate criminal proceedings to establish the truth of the underlying allegation as it was *res inter alios acta* (not the concern of others).

[84] The parties to the murder trial are different and did not in any manner or form, participate in the earlier proceedings in the magistrates court. We echo what has been said in *Hollington* at p 602:

> ... In many, perhaps in most cases, the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence. However convenient the other course may be, it is our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.

[85] We agree with the appellants that the proper place to challenge the credibility of SP29 and SP59 vis a vis exhs P711 and 712 was to put the exhibits to SP29 and SP59 which the prosecution had failed to do.

[86] Further, although the prosecution had relied on ss 11(b), 17 and 74 of the EA as the basis for the admission of P711 and 712, the learned trial judge had ruled that the record of proceedings from the magistrates court were admissible under s 35 of the EA.

[87] Section 35 of the EA reads:

> 35 An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[88] Section 35 governs the admissibility of the non-judicial public documents (see *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65) whereas the records from the magistrates court are judicial records which fall under s 33 which provides:

> 33 Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable.
>
> Provided that —
>
> (a) the proceeding was between the same parties or their representatives in interest;
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross examine;
>
> (c) the question is issue were substantially the same in the first as in the second proceedings.

[89] Section 33 would have been applicable but for the fact that SP29 and SP59 were available and had testified in the trial. In the circumstances, we find that exhs P711 and 712 were wrongly admitted into the trial. As such, they could not form the basis of conviction and neither could they be of any corroborative value. The learned trial judge had thus erred in finding that exhs \P711 and 712 were corroborative of the fact that Sosilawati and company were burnt to death (see also *Public Prosecutor v Leong Heo Cheong* [1990] 2 CLJ 818; *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702).

INFORMATION LEADING TO DISCOVERY UNDER SECTION 27 OF THE EA

[90] In the context of s 27, SP32 was the most important witness for the prosecution. It was submitted that the learned judge had mishandled and had failed to undertake a maximum evaluation of the evidence of SP32. The failure of the learned trial judge to test the evidence of SP32 was contended to be a serious non-direction amounting to a misdirection. *Lim Pah Soon v Public Prosecutor* [2013] 6 MLJ 252; [2013] 8 CLJ 800; *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; *Lee Ah Seng v Public Prosecutor* [2007] 6 MLJ 1; [2007] 4 AMR 709; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 were cited in support thereof.

[91] The evidence of SP32 may be summarised as follows.

(a) on 12 September 2010 at about 10am, Suresh, the third appellant and the fourth appellant brought SP32 and his men to the farm where SP32 recovered a 'penyeduk tanah', bone pieces, nine blood stains, six fingerprints, cut wires, cigarette butts, a cricket bat, soil sample, a container with liquid explosive and cut stained cushion (the first information);

(b) on 12 September 2010 at about 3pm, SP32 'temubual' the fourth appellant and thereafter SP32 was brought by both the fourth and the second appellants to Sungai Panchau where with the help of forensic team and divers, SP32 found a knife, bone fragments, wires, keys, metal parts, a plastic bag with the words 'Tapioca starch, super high grade, 50kg' printed on it (the second information);

(c) on the same day at about 5.45pm, SP32 again 'temubual' the fourth appellant and from Sungai Panchau, SP32 was brought by the fourth and the second appellants to Kunci Air Pasar Besar, Banting where two Blackberry hand phones (black and white) were recovered (the third information);

(d) on 13 September 2010 at 3pm, SP32 'temubual' both the fourth appellant and Suresh at the IPD Kuala Langat. At about 3.30pm, SP32

'temubual' the second appellant and Suresh. SP32 was then brought by the second appellant, the fourth appellant and Suresh to Jambatan Kampung Endah where SP32 recovered a Seiko watch (the fourth information);

(e) at about 6.20pm on 13 September 2010 at Jambatan Sungai Kampung Endah, SP32 'temubual' both the second appellant and Suresh. SP32 was then brought to a rubbish dump at Sungai Arak where 14 pieces of burnt logs were discovered (the fifth information);

(f) on 14 September 2010 at about 11am, SP32 was brought by both the fourth appellant and Suresh to Jambatan Sungai Kampong Endah where a watch (Bell & Ross) was discovered (the sixth information); and

(g) on 14 September 2010 at about 5.05pm, SP32 'temubual' the second appellant and Suresh. SP32 was brought to Sungai Ladang, Kelapa Sawit, Jalan Kenangan where with the help of divers, SP32 found six pieces of zinc sheets (the seventh information).

[92] The credibility of SP32 was challenged by the appellants. The first appellant applied to impeach and the second appellant applied to contradict SP32 on the grounds that:

(a) there are inherent material contradictions in the alleged s 27 information;

(b) there are contradictions between the oral evidence of SP32 and his police reports (in particular Banting Report 7044/10 lodged on 12 September 2010; Tanjong Sepat Report 0947/10 lodged on 13 September 2010 and Banting Report 7070/10 lodged on 13 September 2010); and

(c) there are material contradictions between the oral evidence of SP32 and the station diary (exhs D13A or P591) with regard to the movement of the suspects.

[93] The applications were dismissed by the learned trial judge for the following reasons:

(a) only first information reports ('FIRs') are admissible. The reports lodged by SP32 are not FIRs, hence are inadmissible and cannot be used to contradict the witness; and

(b) there are no material contradictions between the police reports and the oral evidence of SP32.

[94] The appellants contended that the findings of the learned trial judge were erroneous and that the rulings in respect of the appellants' application amounted to a breach of the appellants' right to a fair trial.

[95] The appellants had also raised the issue of police oppression and that the information or statements leading to the discoveries of the exhibits were jointly given by Suresh, the second appellant and the fourth appellants which do not fall within the scope of s 27 of the EA .

OUR FINDINGS ON INFORMATION LEADING TO DISCOVERY UNDER S 27

[96] On the issue of oppression, the learned trial judge had conducted a trial-within-trial after which His Lordship concluded that there was no oppression on the part of the police against the second and the fourth appellants.

[97] Section 27 of the EA is independent and not subject to the voluntariness rule in s 24 (see *Francis Anthonysamy v Public Prosecutor* [2005] 2 CLJ 481; *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507). As such we are of the view that the issue of oppression is immaterial. What matters is whether the information given fulfils the requirement of s 27.

[98] Before we consider whether the information given by the second to the fourth appellants is admissible under s 27, we find merits in the submission of learned counsel that the learned trial judge had erred in his ruling that the police reports lodged by SP32 on the discoveries were inadmissible on the ground that they are not FIRs.

[99] The Federal Court in *Balachandran*, had addressed the issue of admissibility of FIRs and non-FIRs as follows at pp 95–96:

> ... The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve.
>
> ....
>
> It must be added that only the first information report is admissible under s 108A in addition to ss 145 and 157 of the Evidence Act 1950while the other reports are admissible only under the latter provisions of the law.

[100] For convenience, we reproduce below s 145 of the EA:

> Cross-examination as to previous statements in writing
>
> 145 (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him

or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[101] As a matter of fact, s 145 of the EA was relied upon by learned counsel for the appellants in making the application to impeach and to contradict SP32. On the authority of *Balachandran*, we find that the learned trial judge had committed an appealable error in his ruling that the police reports lodged by SP32 were inadmissible.

[102] Be that as it may, we are of the view that the appellants had not been deprived of their rights to a fair trial as the appellants had every opportunity to cross-examine SP32. This brings us to the issue whether there are material contradictions between the oral evidence of SP32 and his police reports.

[103] Learned counsel had highlighted a number of contradictions but for purposes of this judgment, suffice if we state the following.

[104] In cross examination by learned counsel for the first appellant, SP32 stated that with regard to the 3.45pm 'temubual' at Sungai Panchau on 12 September 2010, the fourth appellant, Suresh and the second appellant were with him but only the fourth appellant provided the information. This was in conflict with his Banting Report 007044/10 where SP32 had stated that only the fourth and the second appellants were with him and that both the fourth and the second appellants provided the information at the same time.

[105] We find that the above discloses a material contradiction between the evidence of SP32 and his police report and that the finding of the learned trial judge that there is no material contradiction is, with respect, perverse.

[106] The evidence of SP32 also revealed different versions as regards who gave the information leading to the discovery of the incriminating items.

[107] The first information relates to the acts of pointing by fourth appellant, Suresh and the third appellant at the farm where certain items were then recovered. In the first version, SP32 clearly identified the fourth appellant, the third appellant and Suresh as the suspects who pointed. The second appellant was never identified. However when SP32 was shown the photograph (exh P4(24)), SP32 gave another version when he said 'Kathavarayan (the fourth appellant), Thilai (the second appellant) and Suresh menunjukkan tempat kepada saya'.

[108] The different version raises a doubt as to who actually gave the first information. Was it the fourth appellant, Suresh and the third appellant or was it the fourth appellant, Suresh and the second appellant? And who among them was the first to point which resulted in the discovery of the various items?

[109] As for the second information, SP32 said he was brought by the fourth and the second appellants to Sungai Pancau. The nature of the information was that the fourth appellant was alleged to have said 'Abu mayat buang di Sungai Pancau. Tempat itu boleh tunjuk'.

[110] The first version as regards the second information was that the information was given by the fourth appellant whereas when shown the photographs (exh P5(1–5)), SP32 said 'Gambar Kathavarayan (the fourth appellant) dan Suresh tunjukkan sebuah sungai, dekat Sungai Pancau, ke arah Sungai Pancau. ... Dia tunjukkan di sinilah buang abu mayat ... Kathavarayan (the fourth appellant) dan Thilai (the second appellant) yang tunjukkan kepada saya, Yang Arif'. In the first version, there was no mention that the second appellant also 'tunjuk'. In fact, in the first version, SP32 made no mention of Suresh. In the second version, SP32 said both the fourth and the second appellants 'tunjuk'.

[111] In relation to the third information, it was the evidence of SP32 that he was brought by the fourth and the second appellants to Kunci Air Pasar Besar, Banting where the two Blackberry hand phones were recovered. The first version given by SP32 was that the fourth appellant said 'Kami buang telefon bimbit kepunyaan simati ke dalam sebuah sungai dekat Kampung Endah' whereas the second version was 'Saya buang di Kunci Air Pasar Besar Banting. Saya boleh tunjuk tempat'. 'Kami' in the first version connotes that there was someone else apart from the fourth appellant who had also given the information.

[112] We noted from the record of appeal that the learned trial judge recognised that there are two versions given by SP32 (see AR Vol 9: p 1669) and the learned DPP had also remarked that SP32 kept changing his version (see AR Vol 9: p 1678).

[113] The fourth information which relates to the discovery of the Seiko watch had three versions. The first version was that the fourth appellant gave information relating to the victims' watches; the second version was information given by the fourth appellant relating to hand phones whilst the third version was that the information relating to watches was given by Suresh.

[114] The fifth information concerns the discovery of the 14 pieces of burnt logs at a rubbish dump at Sungai Arak. The first version was that the second

appellant had given the information. The second version was that it was the second appellant and Suresh who had given the information.

[115] As for the sixth information, the first version relates to the discovery of the Bell & Ross watch on the 14 September 2010 at Sungai Kampung Endah on the alleged information given by the fourth appellant and Suresh. The second version was on the discovery of the watch on 13 September 2010 where the fourth appellant was alleged to have said 'kami buang tiga jam tangan mangsa di satu sungai berhampiran dengan Kampung Endah, kami boleh tunjuk tempat itu'.

[116] Finally, in respect of the seventh information which relates to the discovery of the zinc sheets, the first version was that the second appellant gave the information whilst the second version was that the second appellant and Suresh gave the information.

[117] For s 27 to apply, the discovery of a fact must be the consequence of the information given by the accused person (see *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356); the police must not have prior knowledge of the fact (see *Public Prosecutor v Liew Sam Seong* [1982] 1 MLJ 223) and the discovery should be the finding of something which had been partially or wholly concealed and which might not have been found out, at least at that time, except as a consequence of the information given by the accused (see *State of MP v Dhannalal Moruji* 1961 CriLJ 238).

[118] We have no doubt that in the instant appeal, the police had no prior knowledge of the locations where the personal items; items which had the DNA of Kamal, Kamil and Hisham and where the cars belonging to the victims were found. The items would not have been found if not for the information given by the second to the fourth appellant and Suresh.

[119] It is important to keep in mind that only the first information or statement that is admissible under s 27 and not subsequent information or statement (see *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 and *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643). In the light of the above legal principle, our concern is whether the information leading to the various discoveries were given jointly by the second to the fourth appellants as well as Suresh, and who amongst them first gave the information.

[120] Several Indian authorities were cited in support of the submission for the appellants that information given by two or more accused persons jointly is unsafe and not admissible. In *Ramkishan Mithanlal Sharma v The State of Bombay* 1955 AIR 104 the Supreme Court said at p 116:

> The question that really arose for the consideration of the Court there was whether the joint statement attributed to the accused 1 and 2 in that case was admissible without specifying what statement was made by a particular accused which led to the discovery of the relevant fact and it was rightly held that a joint statement by more than one accused was not contemplated by section 27 and the evidence of Mistry, the police officer, in that behalf should therefore have been excluded.

[121] Having perused the appeal records, we find that the evidence of SP32 clearly show that the information given by Suresh and the second to the fourth appellants leading to the discoveries, were made jointly. We find favour in the submission for the appellants that s 27 does not contemplate joint statement by one or more accused persons and that the information or statement given to SP32 ought to have been excluded by the learned trial judge.

[122] We nevertheless agree with the learned trial judge that the acts of the second to the fourth appellants in taking SP32 and pointing to the places where the items were recovered amount to conduct which is admissible under s 8 of the EA. In *Prakash Chand v State (Delhi Administration)* 1979 AIR 400, Chinnappa Reddy J said at p 404:

> The evidence of the circumstances, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act ...

[123] *Prakash Chand* had been cited with approval by our Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149. We therefore accept the evidence of SP32 insofar as it relates to the fact that the second to the fourth appellants had displayed conduct consistent with their knowledge of the places where the items which were connected to the commission of the offence and which belonged to the victims were disposed off (see also *Syamo Malia Patro v Emperor* AIR 1932 Mad 391; *Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516; *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367 and *Mustapha bin Awang Besar lwn Pendakwa Raya* [2015] 3 MLJ 347).

THE CALL DETAIL RECORDS (THE CDRS)

[124] The submission for the appellants was that the computer printouts for the telecommunication ('TELCO') information or records are inadmissible. In respect of the CDRs and the itemised bill from Celcom, it was contended that the information which were extracted for the purpose of producing the CDRs were obtained from different computers which are located separately and not interconnected where the information had to be amalgamated manually by

different people in order to produce the CDRs. As such it was contended that the CDRs are not documents which were printed out by computer as defined under s 3 of the EA and it follows that s 90A cannot be resorted to by the prosecution to prove the information contained therein.

[125] It was further submitted that Norazlina bt Ahmad (SP40) through which exhs P166–P174 were tendered, was not the person responsible for the management of the operation of the computer or for the conduct of the activities for which the computer was used to print the said computer printouts.

[126] It was also submitted that even if the TELCO records are admissible, the evidence do not assist the prosecution case as there is a possibility that the information is inaccurate.

[127] The computer printouts from Maxis (exhs P197–P216) tendered through Ahmad Safuan bin Shaharani (SP46) and the computer printouts from Digi (exhs P348A–P356) tendered through Mohamad Fesal bin Zakaria (SP55), was submitted to have suffered the same fate.

OUR FINDINGS ON TELCO RECORDS/CDRS

[128] We find that the forensic report (exhs P464A and P464B) produced by ASP Mohd Zulkifly bin Mohd Isa (SP76) supported the oral evidence of SP9, SP14, SP15, SP33 and SP62. The forensic report contained SMSs between Kamil and Kamal and also between Hisham and his wife indicating that they were heading towards Banting (see P464A and P464B).

[129] Exhibit P464A revealed that on 30 August 2010 Kamil received numerous calls from number 016-2045518 at 6pm (see P464A p 69 last transaction) and the number was saved in Kamil's contact list under the name of Dato Pathma 2. In our judgment it would not be preposterous to state that Dato Pathma 2 refers to the first appellant.

[130] The evidence of SP15 with regards the call made by Kamil is supported by the CDR of Kamil (exh P176 transaction No 95) which shows that at 6.53pm on 30 August 2010 there was a call from Kamil's number 019-2266222 to SP15's number, 012-7778017. Viewed with the evidence of SP33 that she saw one woman and three men at about 7pm, it is reasonable to infer that when Kamil spoke to SP15, Sosilawati and company were at the stretch of the road leading towards the farm before they reached the farm as seen by SP33. The words 'hutan' and 'kelapa sawit' spoken by Kamil fit the description of the stretch heading towards the farm as can be seen from the

photograph (exh P9(4)). Therefore the irresistible conclusion would be that when Kamil called SP15, Sosilawati and company were very close to the farm.

[131] We have no doubt from the evidence that Sosilawati and company had gone to Banting to see the first appellant and that the first appellant lied to SP24 when he told SP24 that he did not meet Sosilawati in Banting on 30 August 2010.

[132] The CDR of Sosilawati (exh P175 at transaction 29–30) shows that at 17.59 and 18.01, there was a call transaction from number 019- 2295153 belonging to Sosilawati to the number 012-20511243 which was registered under the legal firm of Pathma Nalli & Partners. The CDR of the first appellant's number 012-2045518 revealed a call transaction to Sosilawati at about 12pm on 30 August 2010. We agree with the learned trial judge that it is reasonable to infer that the call would be related to the meeting in Banting later that day.

[133] The learned trial judge had accepted that the TELCO information shows the location of Sosilawati and company. It was the submission for the appellants that the evidence of the TELCO information from Celcom, Digi and Maxis respectively, was inadmissible and inaccurate and that the learned trial judge erred in accepting the TELCO information.

[134] We agree with the findings of the learned trial judge that the witnesses from Celcom, Digi and Maxis respectively had full management and control of the computers generating the documents and had confirmed the accuracy of the data produced in the documents and records. We find no reason to disturb the findings of the learned trial judge and we find that each of the TELCO records from Celcom, Digi and Maxis respectively was correctly admitted notwithstanding some minor discrepancies in the telephone records of Kamil and the oral testimony of SP15 as to who had actually made the call. The fact remains that SP15 had spoken to Kamil on 30 August 2010 where Kamil had given the description of the place he was travelling as 'hutan' and 'kelapa sawit'.

[135] The discrepancy between the oral evidence of SP15 that she was at Hartamas when she received the call from Kamil whereas the CDR shows that she was at Taman Tun Dr Ismail, does not, in our view render the whole CDRs evidence unreliable. We find no evidence that the appellants had successfully discredited the information from the TELCO companies. We therefore find no reason to reject the evidence of CDRs as being not creditworthy (see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617).

[136] Viewed together with the oral evidence of the family members of Sosilawati and company as to their intention to go to Banting and in the light

of the evidence of SP15 and SP33, we accept the evidence from the CDRs as being corroborative of the fact that Sosilawati and company had indeed gone to Banting.

THE DNA/FORENSIC EVIDENCE

[137] The appellants contended that the CSI officers/the marine divers did not follow the search protocols in the alleged recovery of items and had no concern of cross-contamination of the exhibits which could have compromised the DNA findings. The appellants also canvassed the issue of the presence of the DNA of at least four unknown males found on the cricket bat (exh P118B) and the cigarette butts (P122A and P123A) and the DNA evidence on the zinc sheets (exhs P80A, P78A and P75A).

[138] Apart from the arguments that the age of the blood stains found on the wall could not be ascertained; that the sample had degraded and that there was no full profile of the DNA, submissions were made on the Malaysian Malay database and on the equipment used by the chemistry department. The evidence of SP86 was also challenged by the appellants as being hearsay and inadmissible.

[139] A point was raised as regards the knife that was recovered by the divers and thrown back into the river. Learned counsel contended that the knife thrown back was a far more potentially lethal weapon and the investigation in this matter and other related issues had seriously compromised the appellants' opportunity to show their innocence.

[140] The other point raised was on the woods/logs recovered from a dump site which were produced in court by the investigating officer, ASP Mohd Ishak bin Yaakob ('SP99'), implying that these logs had been used in the fire at the farm and thereafter dumped. Learned counsel highlighted that these logs neither had any DNA on them nor the presence of accelerants, thereby belying the prosecution theory of their alleged use.

[141] SP99 had sent 58 soil samples and zinc samples from the farm to Sivabalan, the government chemist. Sivabalan was not called by the prosecution to testify with regard to the analysis that he had carried out on the zinc samples or the soil samples. Sivabalan was however called by the defence and it was the evidence of Sivabalan ('SD20') that no accelerants were detected in the soil. SD20 had also testified that there was no presence of hydrocarbon on the exhibits recovered namely the soil samples, the zinc, the metal pieces and the burnt woods. It was thus contended by the appellants that the evidence of SD20 had negated the presence of accelerants in the soil sample taken from the farm.

[142] As for the bones recovered, the appellants contended that the evidence of SP63 and SP80 did not prove that the bones were human bones.

OUR FINDINGS ON THE DNA/FORENSIC EVIDENCE

[143] The Director of the Forensic Division Department and also the Head of Forensic DNA Serology Section, Chemistry Department, Lim Kong Boon ('SP86') had analysed the blood/tissue sample from the cricket bat and swabs from the wall of a premise in the farm. SP86 found that the cricket bat had the DNA of Hisham and that the DNA on the Swab 9 from the wall matched that of immediate family members of Hisham. The zinc sheets were also analysed where the result revealed that three zinc sheets exhs P80A, P78A and P75A had the DNA of Kamal and Kamil. The complaint of the appellants was that the evidence of SP86 was hearsay as his assistants or lab assistants did the 'ground work' for him.

[144] SP86 had specifically testified that the officers who had assisted him in this case were under his close supervision and under his strict instructions. SP86 gave oral evidence as regards his analysis and he tendered his report exh P600. It is an established principle of law that the chemist is not required to go into details of what he did in the laboratory step by step. So long as the chemist is able to give credible evidence to support his opinion, the court is entitled to accept such opinion unless there is in rebuttal an opinion of another expert (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). In the instant case there is no rebuttal expert evidence. We therefore disagree with the appellants that the evidence of SP86 is hearsay and inadmissible. In our view, the fact that the chemist is assisted by other officers does not ipso facto render the evidence of the chemist hearsay. And we find no reason to depart from the findings of the learned trial judge who had accepted the evidence of SP86.

[145] As to the presence of unknown male DNAs on the cricket bat and the cigarette butts as well as fingerprints, we take note that the farm is on open place and there are other occupants residing at the farm. The existence of unknown male DNAs on the cricket bat and the cigarette butts is immaterial. It does not negate the fact that the DNA of Hisham was on the cricket bat which shows that Hisham was at the farm and the presence of blood irresistibly points to the fact that the bat was used on Hisham. Similarly the DNA of Kamal and Kamil found on the zinc sheets which were recovered as a result of the second appellant and Suresh showing the place of recovery to the police provided the link or nexus between Kamal and Kamil to the appellants. This evidence shows that at least these three victims were at the farm.

[146] As for the contention that there was cross-contamination of the exhibits, we find no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and/or the medical officers are vitiated.

[147] Swab 9 was the bloodstain which was found to be the bloodstain of Hisham based on his DNA testing. The complaint of the appellants was that Swab 9, as admitted by SP86, came from a partial at 13 loci as opposed to a full profile of 15 loci. Regardless, the fact remains that SP86 was able to obtain a profile from it where SP86 had testified that Swab 9 (exh P226A) came from a single source profile. In his report (exh P600), SP86 had concluded that Swab 9 came from Hisham. We see no reason to disregard the finding of SP86 that the DNA of Hisham was found on Swab 9.

[148] A challenge was also made by the appellants in respect of the equipment at the chemistry department. SP86 had explained why the equipment was set at RFU reading of 50 instead of 150 as contended by the appellants. There is no basis for us to reject the explanation of SP86. We therefore dismissed the argument of the appellants on the calibration of the equipment as being devoid of merit.

[149] SP63 who specialises in forensic anthropology did an analysis on the bones found at the farm and from Sungai Pancau. SP63 concluded that the bones were probably human bones. She also found that the bones showed extreme heat-induced colour changes and bone alterations related to exposure to extreme heat. Two other experts namely forensic odontologist Norhayati bt Jaafar (SP69) and radiologist Zaleha bt Abdul Manaf (SP71) similarly stated that the bone fragments were probably human bones.

[150] For the reason that the bones were too charred and burnt, SP71 and forensic anthropology expert, Faridah bt Mohd Nor (SP80) could not make positive findings of the bones. Likewise SP86 could not conduct any DNA extraction or analysis on the bones as they had been subjected to extreme heat and had lost all traces of DNA.

[151] It was submitted for the appellants that the possibility of the bones being animal bones had not been conclusively excluded by SP63 and SP80. As such, their evidence had rebutted the prosecution case.

[152] It is pertinent to note that SP63 had identified the bones found on the farm and Sungai Pancau as 'berkemungkinan besar' human bones and from the testimony of SP63 and SP80, the human bones were subject to extreme heat which was consistent with the prosecution case.

[153] Notwithstanding the lack of positive findings of the bones recovered from the farm and the river and the lack of proof on accelerants, we are satisfied, from the evidence of SP33 and from the presence of the DNA of Hisham found on the cricket bat and the blood stain on the wall and the DNA of Kamal and Kamil on the zinc sheets, that all three of them had been burnt on the farm. The photographs in fact show the combustion site and traces of burning on the farm (see exhs P10(62–79)).

[154] In our view the lack of hydrocarbon does not detract from the fact that SP33 had seen a big fire on the night of 30 August 2010. The photograph (exh P3(88)) shows the effect of burning on the leaves of the adjoining palm oil trees. Taken together with the conduct of the second and the fourth appellants in pointing to the police the river where the ashes were thrown, we are of the view that the evidence of SD20 did not rebut the prosecution case.

[155] We are also mindful of the fact that Sungai Panchau is close to the site for the Hindu ritual casting of ashes and cremains into the sea. Again, given the conduct of the appellants in pointing the river to the police, we conclude that the proximity of Sungai Pancau to the Hindu ritual site does not negate the prosecution case.

[156] On the Malay population database, SP86's explanation on why he had taken a sample of 246 individual Malays was that according to forensic scientific community and SWEDAM (Scientific Working Group on DNA Analysis Method), a population database size of around 100 is sufficient for the purpose of evaluating forensic DNA evidence. Again, we find no reason to reject his explanation. The sample of 246 is thus more than sufficient for the evaluation of forensic DNA evidence.

THE EVIDENCE OF SP33

[157] The appellants contended that the evidence of SP33 was highly suspect for the following reasons:

(a) she admitted that she will lie if necessary;

(b) she admitted that she had lied about her age in order to gain admission into this country;

(c) her evidence appears to be incredible and have been rehearsed or coached or scripted;

(d) the manner in which she answered the question posed by the prosecution and defence shows that she was trained to answer the question;

(e) she admitted that she had flouted Malaysian Immigration laws, yet she is not prosecuted;

(f) she is an interested witness in the sense that she has something to gain by co-operating with the police;

(g) she had an axe to grind against the first and the fourth appellants as she claimed that she had been mistreated by them;

(h) her evidence about the fire and the logs were not supported by forensic evidence;

(i) her evidence contradicted the evidence of another occupant on the farm, Vakasan a/l Richard (SP89); and

(j) her evidence repeatedly mentioned Jacintha, the wife of the fourth appellant, who was not called by the prosecution to corroborate her version.

[158] It was submitted that the learned trial judge had failed to take into consideration the above factors in his appreciation and evaluation of SP33. In essence, the appellants contended that the evidence of SP33 who is under a witness protection programme was almost doctored to meet the needs of the police guardians.

OUR FINDINGS ON SP33

[159] We find no merits in the above submission. The learned trial judge had directed his mind to the challenge made by the appellants on the credibility of SP33 wherein His Lordship found as follows:

> The clearest indication that this witness was a credible and truthful witness was when she honestly answered that she said she saw three men and one woman entering the farm on the evening of 30 August 2010 but could not recognise them and was not able to confirm when the photographs of Sosilawati and company was shown to her that these were the persons who had come to the farm. If she had been coached by the prosecution or had leaned in bias towards the prosecution she could have positively identified Sosilawati and company which would cut out the work for the prosecution.

[160] SP89 did not escape the learned judge's mind when he was found to be a witness of no consequence as he took the attitude of the proverbial monkey of seeing no evil, hearing no evil, and speaking no evil. His testimony indicated that even if any incident had taken place at the farm on 30 August 2010, he would not have known as he had slept right until the morning. This witness, observed the learned trial judge, was not a wholly truthful witness who sought not to cooperate or volunteer any information and taking the cautious attitude of being neutral.

[161] The principle in respect of credibility of witnesses is trite, namely that it is within the domain of a trial judge and unless there are compelling reasons for an appellate intervention, an appellate court would defer to the findings of the trial judge who had the audio visual advantage in assessing the witness (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 and *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 4 CLJ 631).

[162] In the instant appeal, the learned trial judge had given his reasons why he chose to believe SP33 over SP89 and SD26. There is no basis for us to disturb the said findings. The fact that SP33 is under the witness protection programme is not a reason to reject her evidence, which is supported in material particulars by the CDRs, the DNA evidence and the evidence of the fourth appellant.

COMMON INTENTION

[163] It was submitted for the appellants that the evidence which the prosecution could rely upon in order to prove common intention would be the evidence of SP33 and the TELCO evidence. However, the evidence of SP33 failed to prove any of the elements of common intention. And the CDRs did not show any common intention as there is no evidence of proximity among the appellants on 30 August 2010 during the time stated in the charge.

[164] In particular, in respect of the third appellant, submission was advanced that there was no evidence that the third appellant had been in discussion with the other appellants at any material time and that the evidence of SP33 about seeing the second and the third appellants unloading the logs on 29 August 2010 is not unusual as the third appellant and the others were workers at the farm.

OUR FINDINGS ON COMMON INTENTION

[165] It is settled law that common intention may be inferred from the facts and surrounding circumstances of the case (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 and *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617). The prosecution submitted that the participation of each of the appellant in the commission of the crime can be seen from their conduct during the discovery of the incriminating items recovered at the various locations.

[166] The learned trial judge found that from the evidence, Sosilawati had business transaction with the first appellant who acted as her solicitor and that Sosilawati and company came to the farm in two cars. The cars were later found at separate locations upon being shown by SP59. The learned trial judge found

that the only person who had dealings with Sosilawati was the first appellant and that if there was any grudge, it must be borne by the first appellant and that the second to the fourth appellants were his lackeys executing his instructions.

[167] We accept that there is no evidence of discussion between the appellants. The evidence that we can rely on as regards the participation of all the appellants is from the evidence of SP33 who testified as to the presence of the appellants on the farm at the material time and from the conduct of the second to the fourth appellants. It is a clear principle of law that for the participation requirement, even a passive role in the commission of the act is enough (see *Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688). It is in the evidence of the fourth appellant that the second and the third appellants arranged the bodies of Kamal, Hisham and Kamil on the logs and subsequently burnt them.

OTHER ANCILLARY ISSUES

[168] Apart from the issue of undertaking and/or prosecutorial misconduct which we had addressed above under exhs P711 and 712, the other issues raised by the appellants which may be categorised as procedural unfairness relate to the striking out of the subpoenas against the DPPs and the departure by the prosecution from its opening address.

[169] On the issue of subpoenas, the DPPs who conducted the proceedings against SP29 and SP59 in the magistrates court were the same DPPs conducting the murder trial. In the light of the allegations by SP29 and SP59 that they were coerced into pleading guilty in the magistrates court, the appellants contended that there was complicity between the police, the lawyers and the prosecutors in the proceedings against SP29 and SP59, hence the issuance of the subpoenas against the DPPs which were struck out by the learned trial judge.

[170] As for the departure from its opening statement, the appellants contended that the course taken by the prosecution had caused prejudice to the appellants.

[171] For the fourth appellant in particular, a complaint was raised as regards the manner the learned trial judge dealt with his new assigned counsel. The learned trial judge had given the new counsel less than ten days to get ready for the trial. It was contended for the fourth appellant that it was humanly impossible for the new counsel to get ready in less than ten days at the stage where more than 90 witnesses had given evidence involving 10,000 pages of notes of proceedings. Another complaint of the fourth appellant relates to the

directive given by the learned trial judge that the fourth appellant be isolated from the rest of the appellants and their defence counsel.

OUR FINDINGS (PROCEDURAL UNFAIRNESS, COMPLICITY BETWEEN THE POLICE, LAWYERS AND THE PROSECUTORS; SUBPOENAS AGAINST THE PROSECUTORS)

[172] The proceedings against SP29 and SP59 in the Magistrates Court Teluk Datuk had gone through the judicial process. There is no proof of any complicity as suspected by the defence. We find no impropriety in the proceedings and we agree with the learned trial judge that the application to call the prosecutors as witnesses was not relevant for the following reasons:

(a) if the purpose of calling the three DPPs was to prove any irregularity of the proceedings concerning SP29 and SP59, then such evidence would be more relevant in those proceedings, not in the murder trial;

(b) if the purpose of calling the three DPPs was to prove that force was used on SP29 and SP59 to elicit guilty pleas from them, then the evidence of the three DPPs would be of little assistance because the sole determinant whether a person had pleaded guilty voluntarily is the magistrate;

(c) the record of the magistrate showed that he had noted on a number of occasions that SP29 and SP59 had pleaded guilty voluntarily;

(d) there were no circumstances shown under which the three DPPs could assist the court and calling them as witnesses will only serve to put them in the 'spotlight' and will divert the murder trial; and

(e) the testimony of the three DPPs in relation to the magistrates court proceedings against SP29 and SP59 is irrelevant and would not alter the record of proceedings in the magistrates court.

[173] We also agree with the learned trial judge that while it is a procedural requirement for the prosecution to tender an opening statement as stipulated under s 179(1) of the CPC, a conviction may be founded on a basis not indicated by the prosecution in its opening address (see *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197). We further agree with the learned trial judge that the departure from the opening statement did not adversely affect the prosecution case. Richard Malanjum CJ (Sabah and Sarawak) stated the following in *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2010] MLJU 2092; [2013] 1 CLJ 177:

> The contents of the opening statement of the learned deputy should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. We would further say that an opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or

defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice.

[174] In respect of the fourth appellant's specific complaint against the learned trial judge, we find the complaint to be devoid of any merits. The learned trial judge had enquired from the new counsel whether he was ready to proceed and learned counsel had answered in the affirmative. As for the directive that the fourth appellant be isolated from the rest, we gather from the appeal record that the fourth appellant had lodged a police report that he had been threatened. More importantly, we have not been shown how the trial judge's ruling had prejudiced the fourth appellant in putting up his defence.

EVALUATION OF THE DEFENCE

[175] The first appellant served a notice of alibi pursuant to s 402A of the CPC. In putting forward the defence of alibi, the burden on the first appellant is to adduce credible evidence to cast a reasonable doubt that he was at the scene of the crime as contended by the prosecution (see *Azilah bin Hadri*; *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and s 103 of the EA (illustration (b)).

[176] ACP Mohamad Jamil bin Mohamad Hassan (SP61) stated in his evidence that on 30 August 2010 at about 1.30pm, the first appellant had called him to invite him for break fast. However, according to SP61, after 7pm, the first appellant did not call him to confirm the plan. SP61 then called the first appellant and SP61's testimony is as follows (RR27: pp 5361–5362):

Telefon nombor yang saya sebutkan tadi itu dan dapat jawapan daripada beliau dan beliau bagi tahu kepada saya, dia semalangnya dia tidak dapat hadir kerana dia dikehendaki menyelesai urusan-urusan yang belum diselesaikan lagi. Tetapi dia juga bagitahu kepada saya, dia datang juga jumpa saya malam itu dan dia suruh saya tunggukan dia. Jam belum dia tetapkan lagi.

[177] It was the argument of the prosecution that the appointment for the break fast was deliberately planned by the first appellant with the view to set up his defence of alibi.

[178] To establish alibi, the first appellant must disclose where he was at the time of the alleged offence and what he was doing (see *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166). The time as preferred in the charge was between 8.30pm–9.45pm on 30 August 2010. The first appellant arrived at Dorsett Hotel, Subang to meet SP61 at about 10.15pm–10.20pm. We find that the evidence of SP61 is not evidence in support of alibi. The first appellant could be travelling at the time stated in the

charge in which case the evidence of his brother who had purportedly driven him to Subang would be material but the brother was not called to testify.

[179] Further, the evidence of the first appellant in his defence contradicts the evidence given by SP61. According to SP61, the first appellant told him that the first appellant was sent to Dorsett Hotel by his brother. In his defence, the first appellant stated that it was the fourth appellant who had driven him to Dorsett Hotel, which version was denied by the fourth appellant. In the circumstances we find that the first appellant's defence of alibi had failed to raise a reasonable doubt on the prosecution case.

[180] The defence of the first, second and the third appellants was one of a complete denial. The defence of the fourth appellant, on the other hand, implicated the first three appellants. From the evidence of the fourth appellant, which was in material contradiction with the evidence of the first to the third appellants, it is apparent that there was a 'dog fight' between the first to the third appellants and the fourth appellant.

[181] In *Public Prosecutor v Lim Teik Seng & Ors* [1985] CLJ Rep 691 the learned judge said at p 700:

> In passing I would pause to remark, that as often happens when there is a dog fight between the defendants in a criminal trial — and by this I mean where one defendant in the course of his evidence put forward a defence which constitutes an attack upon his co-defendant, as happened in this case, so far as the second and third accused persons were concerned — the result are usually disastrous for both.

[182] Indeed, in the present instance, we similarly find that the result of the attack by the fourth appellant on the three other appellants is disastrous to all of them. The fourth appellant had narrated in his evidence the involvement of each one of them in the commission of the murder. A substantial portion of the evidence of the fourth appellant supported the prosecution case.

[183] In particular, the fourth appellant testified that:

(a) the first, the second and the third appellants were present at the farm on 30 August 2010;

(b) Sosilawati and company were also at the farm on 30 August 2010;

(c) he heard screams and sound like there was a fight in the karaoke room;

(d) the first appellant had instructed him to inform the rest of the people at the house not to come out;

(e) Sosilawati and company were murdered at the farm on 31 August 2010;

(f) the instruction to kill was given by the first appellant;

(g) the preparation to kill and burn the bodies were done on 29 August 2010;

(h) the second and the third appellant had laid the logs and burnt the three men;

(i) the first appellant told the second to the fourth appellants that they can co-operate with the police and give statement; and

(j) later the second to the fourth appellants can claim that they had been forced by the police to make the statement.

[184] The learned trial judge accepted the evidence of the fourth appellant which was consistent with the prosecution case and rejected that part of his evidence which contradicts the prosecution case. The learned trial judge is entitled to take that approach (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

CONCLUSION

[185] It is our judgment that at the end of the prosecution case, the learned trial judge had correctly called for the defence. From the direct evidence of family members, friends and SP33, taken together with the circumstantial evidence in the form of the CDRs, the forensic and the DNA evidence which established the presence of Sosilawati and company at the farm, it could be safely inferred that Sosilawati and company had met their deaths at the farm. The knowledge that the second, third and the fourth appellants had of the places where the incriminating items were found and their conduct in showing those places to the police is a definite pointer towards the guilt of the appellants.

[186] The phone calls from Kamil and Hisham that Sosilawati had problem with her driver, Kamal and that they would be going to Genting Highlands for three days was a version that is difficult to believe, incredible and improbable. It was the holy month of Ramadhan and it was highly unlikely that they would at the spur of the moment, decide to go to Genting Highlands. And why Genting Highlands to sort out the alleged problem that Sosilawati had with Kamal? In our view, it is more probable that they were forced to make the calls to deviate the attention from the first appellant and Banting.

[187] At the conclusion of the trial, we are satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. The evidence of the fourth appellant corroborated SP33 in material particulars. In fact, the evidence of the fourth appellant had strengthened the prosecution case. We do not lose sight of the fact that the DNA of Sosilawati was not found on either the cricket bat, the swabs of blood stains on the wall or on the zinc sheets.

[188] Notwithstanding the above, we are of the view that the inferences to be drawn from the facts and circumstance of this case unerringly lead to the conclusion that within all human probability, Sosilawati is dead and that the appellants were the perpetrators leading to her death as well as the death of Kamal, Hisham and Kamil. The principles set out in *Sharad Birdhi Chand Sarda*, in our view, had been met by the prosecution.

[189] Taking the evidence cumulatively, we find that the convictions of the appellants are safe. We therefore unanimously dismiss the appeals and we affirm the convictions and sentences of the appellants.

Appeals dismissed.

Reported by Kohila Nesan